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No. 80-1994

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE NASH COUNTY BOARD OF EDUCATION,

PETITIONER,

versus

THE BILTMORE COMPANY; BORDEN, INC.;
COBLE DAIRY PRODUCTS COOPERATIVE, INC.;
PET, INC.; AND FLAV-O-RICH, INC.,
FOR ITSELF AND AS SUCCESSOR IN INTEREST
OF UNITED DAIRIES, INC.,

RESPONDENTS

# Reply Brief of Petitioner

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## ARGUMENT ON NEW MATTER

Petitioner files this Reply Brief in response to new matter brought forward in Respondents Brief in opposition.

### FIRST

Respondents assert that:

> "the petitioner does not now contend that the earlier state court judgment lacked finality, that it was anything other than a judgment on the merits, or that the earlier action sought relief for anything less than all injury and wrongs for which relief is sought in the second proceeding."
> (Res. Brf. Page 4).

This statement is not correct -- on page 11 of Petitioner's Brief is found the following:

> "NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby . . ."

Thus, it is apparent on the face of the State's judgment that it is <u>not a judgment on the merits</u>.

In fact, the State's case was settled before all the Defendants had filed answers.

It is also apparent that the instant case sought relief different from and in addition to the relief granted in the consent judgment between the State itself and the Defendants.

That State judgment recovered no damages for anybody and only provided for future injunctive relief and that only after reciting"

> "and the parties hereto desire to consent to the entry of this judgment without the said consent judgment constituting evidence of, or being construed as, an admission by either party with respect to any issue of fact or law." (Pet. App. Page 97) (Emphasis added).

It did not ever purport to settle the claims for the school boards -- this is shown by the judgment itself to which the school boards were not parties and to which the school boards did not consent. (Pet. App. Page 98).

This is further shown by the fact that the Attorney General, both before the judgment

was signed and at the time of the signing, informed the Respondents that he was not settling for the school boards, (Pet. App. page 97).

His letter (written after the signing of the judgment) never mentioned damages except to tell the school boards they were free to pursue their treble damage claims (App. This Reply Brief Page 4) and recites that the State's judgment:

> "requires the defendants to adhere to the following terms (without admitting violations of the law occurred.):" (App. This Reply Brief page 2) (Emphasis added).

The Attorney General's letter (written after the signing of the judgment) also shows it was the first time he had told the school boards of his action:

> "Based on the information obtained from our investigation, we filed an action against several processors . . ." (App. This Reply Brief page 1) (Emphasis added).

Surely the fact that the Attorney General obtained an injunction to prohibit future violations of the antitrust laws could not

preclude action by the school boards to recover treble damages sustained by them for past violations of the antitrust laws.

Such actions are normally brought against antitrust violators by persons injured after the F.T.C., the Justice Department or any other Court has entered consent judgments requiring future compliance with the antitrust laws.

SECOND

The doctrine of res judicata itself shows definitively that the Consent Judgment in this case will not support the plea. In 46 Am Jur 2d §394, page 558, the doctrine is set forth as follows:

> "Literally, res judicata means a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. As stated in many cases, the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." (Footnores omitted).

The Consent Judgment was not rendered on the merits and so states on its face:

> "NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby..." (Pet. App. Page 98).

Since the Court of Appeals held that the Nash County Board of Education was not a "party" to the Consent Judgment, but was in privity, it becomes important to analyze the nebulous term privity.

> "Privity is not established, however, from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action. The term "privy" when applied to a judgment or a decree refers to one whose interest has been legally represented at the trial. It has been declared that if the interests of two groups of persons were in conflict at the time of the first action, they are not privies within the meaning of the doctrine. A trial in which one party contests his claim against another should be held to estop a third person only when it is realistic to say that the third person was fully protected in the first trial. There can be no such privity between persons as to produce collateral estoppel unless the result can be defended on principles of fundamental fairness in the due

process sense." 46 Am Jur 2d §532, Pages 685-686, (Footnotes omitted) (Emphasis added).

The ruling below certainly can not be defended on principles of fundamental fairness. The school boards recovered not one cent for millions of dollars of illegal overcharges, nor can it be defended under due process because there was no notice, no hearing, no opportunity to be heard and no consent on the part of the school boards.

The Respondents cite In re Armored Car Antitrust Litigation, 645 F. 2d 488, which was handed down on May 21, 1981, subsequent to the filing of the instant petition, in support of their contention that the North Carolina Attorney General had authority to settle the claims of the school boards.

However, in the instant case, both the Attorney General and school boards say that, regardless of any authority he may have, he did not settle for them and so informed the Respondents.

In Armored Car, supra, the Attorney General

specifically said he was opting out of the class action for the State of Maryland:

> "on its own behalf and on behalf of its political subdivisions, including but not limited to, all Maryland county and local governments and State, county, and local governmental agencies, commissions, school boards, hospitals and universities, hereby requests to be excluded from the consitional class and the proposed settlement. (Emphasis ours)".

and the three boards of education who had filed claims stated:

> "their assumption that the Attorney General's action was on their behalf and in accord with their intent at the time is was taken." Armored Car, supra, Page 492.

The decision specifically says on page 493:

> "We need not reach in this case the question of whether political subdivisions must follow the decisions of the Attorney General, or the question of whether subdivisions may discharge the Attorney General and act on their own behalf, because there is here no dispute as to whether the subdivisions desire the Attorney General to act as their attorney. The evidence establishes that they do. If there were doubt as to the representational status of the Attorney General, it was resolved by the subsequent ratification of the opt-out request by the three claimant subdivisions."

IN THE INSTANT CASE, BOTH THE ATTORNEY GENERAL

AND THE SCHOOL BOARDS SAY HE DID NOT REPRESENT THEM.

Armored Car, supra, specifically sets forth that political subdivisions are "persons" under the antitrust laws where they say on page 492:

> "[1] That political subdivisions are 'persons' under the federal antiturst laws and have independent standing to bring federal antitrust actions, Chattanooga Foundry and Pipe Work v. Atlanta, 203 U.S. 390, 27 S.Ct. 65, 51 L. Ed 241 (1906), and that 'political subdivisions' has been interpreted as including counties, cities, towns and villages, Maryland-National Capital Park and Planning Commission v. Montgomery County, 267 Md. 82, 93, 296 A.2d 692, 698 (1972)".

This is in exact accord with the position taken by Petitioner and the Attorney General of North Carolina -- to wit -- that even if he had the authority to represent the school boards, he did not represent them.

Surely the Courts should not hold that the Attorney General represented the school boards and settled their case when the Attorney General himself says he did not and the school boards say he did not.

For the reasons set forth in the Petition, in the Attorney General's Amicus Brief and in this Reply Brief, it is respectfully submitted that the Petition should be graned and the doors to the Halls of Justice should be opened to the school boards because:

1. They were neither parties nor privies to the State's action or the State's judgment.

2. The Consent Judgment in the State's action is not a judgment on the merits.

Respectfully submitted, this 29 day of June, 1981.

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APPENDIX TO

PETITIONER'S

REPLY BRIEF

APPENDIX TO PETITIONER'S REPLY BRIEF

State of North Carolina
Department of Justice
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Rufus L. Edmisten
Attorney General

June 18, 1975

MEMORANDUM

TO: School Superintendents and Food Service Directors

FROM: Rufus L. Edmisten
Attorney General

R. L. E.

RE: School Milk Bid Case

I am writing to thank you for your assistance in our investigation into bid rigging practices by milk processors to public school systems. Based on the information obtained from our investigation, we filed an action against several processors alleging that they had, at various times since February, 1970, joined in agreements, combinations, and conspiracies in restraint of trade in the sale of milk and milk products to the public school systems of North Carolina. (Emphasis added)

We are pleased to advise you that the litigation has been settled and that a consent judgment signed by the defendants Biltmore Dairy Farms, Inc.; Borden, Inc.; Coble Dairy Products Cooperative, Inc.; Maola Milk and Ice Cream Company; Pet Incorporated; Pine State Creamery Company; Kraftco Corporation; and Flav-O-Rich, Inc. has been filed in Wake County Superior Court. A copy of that judgment is available from this office on request.

The judgment requires the defendants to adhere to the following terms (without admitting violations of the law occurred):

(1) Defendants are prohibited, directly or indirectly, from fixing the prices of fluid milk, ice cream, or cottage cheese to be charged to any school system in the future.

(2) Each bid will be determined independently, with the defendant sending a copy of the bid to this office.

(3) Any negotiated price must be filed by the defendant with this office.

(4) Upon written request by this office, the company will supply a written description of the means by which the price was determined.

(5) Annual reports are required from each defendant detailing the steps taken to advise its personnel of their obligations under the terms of the judgment.

In view of the relief the Attorney General was able to obtain by consent, combined with the uncertainties and costs inherent in what most certainly would have been protracted litigation, it was felt that this settlement of the case would provide the greatest benefit to the State at the least possible risk. (Emphasis added)

If the Attorney General feels a defendant is not complying with the terms of the judgment, he may seek enforcement and sanctions in the Superior Court, which has retained jurisdiction until May 12, 1978. We would, of course, seek your cooperation in helping us enforce the judgment by reporting any activities of

the defendants that you feel may violate the terms of the judgment. (Emphasis added)

Additionally, it should be pointed out that the settlement in no way proscribes actions by individual school systems to recover monetary damages for overcharges that resulted from the rigging of bids. (Emphasis added)

If you have any questions or information concerning this matter, please feel free to contact this office.

AFFIDAVIT

JOHN M. SILVERSTEIN, first being duly sworn, avers:

1. That he is an attorney licensed to practice law in the State of North Carolina.

2. That on June 18, 1975, he was the acting Special Deputy Attorney General in charge of the Antitrust Section of the North Carolina Department of Justice.

3. That on June 18, 1975, in his capacity as acting Special Deputy Attorney General, he caused to be sent out a memorandum dated

June 18, 1975, to School Superintendents and Food Service Directors in North Carolina from Attorney General Rufus L. Edmisten regarding the School Milk Bid Case.

4. That on or about June 18, 1975, the aforesaid memorandum was in fact placed in envelopes addressed to all School Superintendents and Food Service Directors in North Carolina by personnel in the Antitrust Section of the North Carolina Department of Justice; and that, to the best of his information and belief, said envelopes were deposited in the United States mail at Raleigh, North Carolina.

This the 7th day of September, 1977.

/s/John M. Silverstein

## Certificate of Service

This is to certify that the undersigned, a member of the bar of this Court, served at least three copies of this Reply Brief upon all of the parties to this action by depositing said brief in the United States mail, postage prepaid, addressed to their attorneys whose names and post office addresses are:

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